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## Procedural Fairness and University Students: England and Canada Compared

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### I. *Introduction*

Universities have recently been subjected to increased demands for judicial scrutiny of the conduct of their affairs, especially in the area of procedural review. Much of the academic writing has concentrated on these developments as they affect the academic staff of the university.<sup>1</sup> This article seeks to redress the balance by considering procedural fairness in the context of university decision-making as it affects students. A study of university decision-making provides a useful framework for a more general consideration of the new approach to "procedural fairness" with its emphasis on balancing the nature of the decisions against the competing interests of those involved to assess what specific procedures are required in a particular context.

Universities are complex institutions performing a number of functions in their relations with their student population. Each university has its own institutional structure and differs in the way that it distributes these functions among the various university committees and bodies.<sup>2</sup> In principle, there seem to be three broad categories of decisions affecting students, reflecting the different aims of a university.

First, as an academic institution, one of the primary aims of a university is the promotion of knowledge and learning through

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1. See for example Vining and McPhillips, *New Developments in Natural Justice: Their Application to Tenure Decisions* (1982), 27 McGill L.J. 330 and works cited therein. For an earlier article focussing on the position of the student, see Lewis "The Legal Nature of a University and the Student University Relationship" (1983) 15 Ottawa Law Review and 49.

2. For a broad sketch of the structure of United Kingdom universities see the *Report of the Committee on Higher Education* (London HMSO 1963) chaired by Lord Robbins, chapter 3, "Internal Government of Universities". For the position in Canada see the Duff-Berdahl Report on *University Government in Canada* (published by the University of Toronto press, 1966).

teaching and research.<sup>3</sup> Integral to this is the system of grading examinations, papers and other requirements for the awarding of degrees. Evaluations of this sort are highly subjective. In order to offer some objective check on this essentially subjective process, universities may establish a marks appeal procedure. Decisions of this nature are obviously of vital importance to the student, affecting as they do, the quality of a student's degree — or the more basic matter of whether a student is to be awarded a degree at all after perhaps years of work.

On a different plane, universities normally possess a large corpus of regulations governing the requirements of degree programmes. Under such regulations students may seek decisions exempting them from certain requirements, recognising work at other institutions, allowing additional attempts at examinations and so on. Some of these decisions involve students establishing facts that bring them within certain regulations or demonstrating why regulations should be waived in a particular case. They differ in essence from the evaluation decisions but again may determine whether a student is to receive a degree or what requirements he will have to meet to do so. Thus there is a broad range of decisions to be taken that may differ in nature but all of which have serious consequences for the individual student concerned.

Second, a university also has its own code of ethics designed to protect its academic integrity. Plagiarism and cheating are usually treated as academic offences. Alleged violations have to be investigated and sanctions imposed. These may range from denying a student credit for a particular course to expulsion or suspension from the university. In addition, a finding of plagiarism may carry a moral stigma, often making it more difficult to pursue a career at another institution or otherwise affect a student after leaving university.

Third, as a largely self-regulating community where a large number of people work and often live together, universities must regulate the conduct of their members, at least in so far as this is necessary to ensure an orderly environment for the pursuit of its

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3. For a general discussion of the university as an institution see *The Discipline of an Academic Community* (1968) prepared by the University of Bradford branch of the Association of University Teachers, paragraphs 8 to 15. See also Hurtubise and Rowatt Report on *The University Society and Government*, esp. at chapter 3, "Nature and Functions of the University" (published by the University of Ottawa press, 1970).

primary academic aims. This involves the authorities adjudicating on alleged violations and imposing sanctions where appropriate. These sanctions may range from reprimands and small fines to suspension or expulsion — which of course deprives students in effect of the means of pursuing their education.

Some of these decisions lend themselves more easily to certain types of procedure. For example, a disciplinary matter involving questions of disputed fact and witness credibility might be more suitably dealt with in an oral hearing with cross-examination. On the other hand, a grade appeal which is essentially subjective in nature fits far less comfortably in this mould.

The interest of the student lies in membership of a university and obtaining an academic qualification. The value of this interest has probably increased in recent years.

Employment may often depend upon possession of a degree which may be a *sine qua non* for some professions. Students have been judicially described as “potential graduates and potential holders of degrees which could prove advantageous in professional or commercial life”.<sup>4</sup> They also enjoy access to the considerable non-academic benefits of university life in its associations, facilities and activities. Consequently, decisions depriving a student of his position or affecting his degree are very significant ones. This much has been expressly recognized by British university administrators:

Disciplinary matters have in one sense assumed increasing importance as the value of a degree as a starting point has grown, and a decision to suspend or even in some cases to send down a student is regarded in a much more serious light than it would be a generation ago.<sup>5</sup>

While these words were uttered in relation to disciplinary matters they can be applied with equal force to the whole gamut of university decisions.

The university has legitimate interests in ensuring speed, efficiency and low cost in its administration. At the very least, university decision-makers cannot be expected to operate in a manner that detracts seriously from the primary aims of the institution. It would not be

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4. Per Blain J. in *R. v. Aston University Senate exp. Roffey*, [1969] 2 Q.B. 538, at p. 556; Donaldson J. also stresses the value of student status at p. 552.

5. Joint Statement of Vice-Chancellors and Principals and the National Union of Students, reproduced in Volume 11 of the Select Committee on Education and Science. *Report on Student Relations* (1969), at p. 83 paragraph 13.

realistic, for example, to require a full meeting of a large body like a university senate to take every decision that might affect students. The time consumed will have to be taken from teaching and research. The senate itself will have to curtail broader policy debates to accommodate these individual petitions. The cost of the bureaucracy to service such meetings may be high, leaving less resources for academic purposes. Even smaller committees required to hold oral hearings take up the time of their members and use resources. Some decisions may justify the expense; other may not.

This article considers first the content of the right to a fair hearing within the university context. An attempt is made to identify the characteristics of the different types of university decision, and the interests of the student and the university. These factors are then balanced against each other to assess what procedures are appropriate in a particular context.

Then the rules against bias and delegation of decision-making power are considered. Particular problems arise in universities because of the nature of their institutional structure. Initially, power is normally vested in a Senate or Board of Governors and then delegated to faculties who in turn delegate the powers to committees. Cross-membership of committees, faculty and university bodies, raises special problems about bias.

Finally, potential barriers to a student seeking judicial review of a university decision are examined. Particular attention is focussed on an emerging duty to exhaust internal remedies before seeking judicial review.

## II. *Academic Decisions*

These decisions can be subdivided into two broad categories. First, there are those decisions which are 'purely' academic in the sense that they involve a subjective evaluation of the academic merit of a student's work. Secondly there are those decisions which involve objective facts in some way — whether because a student brings forward material to justify the application or waiver of a faculty rule or policy or because there is a dispute over facts when the university applies its regulations on degree requirements to the student.

In the first category, which involves the marking of examination scripts or the assessment of the academic capability of the student, the university has a legitimate claim to expertise. The arranging of examinations and the setting of standards is not an area where judicial supervision is particularly appropriate. The fact that a decision to

fail a student can seriously affect his academic career —and perhaps lead to his exclusion from university or the refusal of a degree — can do nothing to alter the highly subjective nature of the decisions. Any system of objective checks by means of grade appeals would seem best left to the university.

The courts have consistently refused to involve themselves in reviewing purely academic matters such as the method or accuracy of an academic evaluation. In the United Kingdom, the courts have usually denied themselves jurisdiction on the grounds that all matters relating to academic assessment are a purely internal matter falling within the sole jurisdiction of the university visitor.<sup>6</sup> The visitor is a university functionary having jurisdiction over the “internal arrangements and dealings with regard to the government and management of the house, of the domus [or] of the institution”.<sup>7</sup> As long ago as 1864, *Kindersley V.C.* refused to adjudicate on a dispute arising out of the regulations governing the marking of the LL.D. examinations in the University of London, stressing that:

The holding of examinations and the conferring of degrees being one, if not the main or only object of this University, all the regulations, that is the construction of all the regulations and the carrying into effect of all those regulations. . . all those are regulations of the domus: they are regulations clearly in my mind coming within the jurisdiction, and the exclusive jurisdiction, of the Visitor.<sup>8</sup>

The same justification for not adjudicating on a dispute arising from a student's failure to pass two examinations was used as recently as 1978 by *Megarry V.C.*<sup>9</sup> In Australia this reluctance has gone as far as refusing mandamus to compel a Visitor to adjudicate on such a dispute, as “it would be undesirable that his function should be capable of being called in aid by any student who might be dissatis-

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6. For thorough discussions of the institution of the Visitor, see Bridge: *Keeping the Peace in Universities: The Role of the Visitor* (1970), 86 L.Q.R. 531; P.M. Smith: *The Exclusive Jurisdiction of the University Visitor* (1981), 97 L.Q.R. 610; for the position in Canada, see Quellette: *Le Contrôle Judiciaire sur l'Université* (1970), 48 Can. Bar Rev. 631; McConnell: *The Errant Professoriate: An Inquiry into Academic Due Process* (1973), 37 Sask. L. Rev. 250; Ricquier: *The University Visitor* (1977), 4 Dal. L.J. 647.

7. Per Kindersley V.C. in *Thomson v. University of London* (1864), 33 L.J. (Ch.) 625 at p. 634.

8/ *Ibid.*, at p. 634.

9. In *Patel v. University of Bradford Senate*, [1978] 1 W.L.R. 1488 Ch.; aff. [1979] 1 W.L.R. 1066 (C.A.).

fied with the conduct or result of his examinations".<sup>10</sup>

While the justification put forward for judicial reticence might be their lack of jurisdiction, at the heart of the matter lies a realisation that the courts lack the ability or expertise to supervise academic assessments. In *Thorne v. University of London* where the court similarly deferred to the jurisdiction of the Visitor in an action, complaining of negligence in the marking of examinations Diplock L.J. may have been closer to the truth when he said:

The High Court does not act as a court of appeal from university examiners; and speaking for my own part, I am very glad that it declines jurisdiction.<sup>11</sup>

The Canadian courts have displayed a similar reluctance to become involved in purely academic assessments. In the words of Weatherston J. in *Re Polten and the Governing Council of the University of Toronto*:

[T]he standards for a degree, and the assessment of a student's work, are so clearly vested in the university the courts have no power to intervene merely because it thought that the standards are too high, or that the student's work was inaccurately assessed.<sup>12</sup>

The position in Canada is complicated by the fact that most universities have themselves adopted a grades appeal system which allows a student to challenge a particular grade. This inevitably involves the courts in deciding whether the procedures followed in a grade appeal are adequate, although Weatherston J. has made it clear that the courts will not be drawn into review of the methods or accuracy of the academic assessment. The issue was considered in *Re Polten*<sup>13</sup> where a student challenged a decision to refuse him a doctoral degree, claiming that he had not been present at an appeal hearing and had not been given the opportunity to defend his thesis

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10. Per Davidson J. in *ex p. McFayden* (1945), 45 S.R. 200 (N.S.W.). This is a strong statement as the student alleged personal vindictiveness on the part of the examiner, not simply challenging the academic assessment. This might not now be the attitude of the courts today in these circumstances.

11. [1966] 2 Q.B. 237 at p. 243 —C.A.). The cases of *Sammy v. Birbeck College* Times Law Report 3rd November 1964 —H.C.) *D'Mello v. Loughborough College of Technology* Times Law Report 17th June 1970 (H.C.) were concerned with breaches of contract arising from alleged failures to teach adequately not to mark properly.

12. (1975) 59 D.L.R. (3rd) 197 (Ont. H.C.D.C.), at p. 206.

13. *Ibid.*

before the appeal. Weatherston J. stressed that the appeal process was not intended to constitute a new examination or assessment, rather it was an inquiry to ensure that the examination had been properly conducted. A grade appeal system is really 'procedural review' of the initial decision not an appeal on the merits. Consequently the student was not entitled to reopen the question of the accuracy of the assessment. In performing the task of ensuring the examination was properly conducted, Weatherston J. stated firmly that neither an adversarial procedure nor an oral hearing was required; the appeal board could deal with the matter by written submissions from the student setting out his complaint. Presumably the faculty member would set out the procedure for evaluation and the student would outline his reasons for believing that this method was not properly applied. There are however circumstances where questions of fact are in issue — such as whether a faculty member did explain the method of evaluation to the students. However, the nature of a grade appeal, the antagonism that oral hearings and cross-examination might generate together with the administrative burdens that these types of procedure would impose suggest that they are not appropriate in the context of grade appeals.

It is useful to give further consideration to what material can fairly be said to form part of an academic assessment as a student will not be entitled to challenge the accuracy of this material before an appeal board or a court. The setting of academic standards and the marking of examination scripts and research papers obviously fall into this description. One case, *Herring v. Templeman*,<sup>14</sup> suggests a wider definition of 'purely academic'. There a board had to assess a student's teacher training practice at a school. In doing so they considered reports from the school headmaster, external assessors and members of the college staff. The court held that all this was relevant material in an academic assessment of the student. As such, the gathering of the material was not subject to judicially imposed procedural requirements. Therefore a student had no common law procedural right to call witnesses and engage in cross-examination on this material. It seems that anything that involves an assessment of academic ability might escape the rigours of judicial control. It might, of course, be a different matter if any genuine doubts about the good faith of those making the assessment were involved. It is,

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14. [1973] 3 All E.R. 569 (C.A.).



though, unlikely that a court would question the university's good faith except in exceptional circumstances.

A Canadian case, *Re McInnes and Simon Fraser University*<sup>15</sup> suggests another ground on which the courts might intervene in this type of academic evaluation. The court held that an appeal body whose duty it was to ensure that the assessment was properly and fairly conducted, must have "some evidence logically capable of supporting the conclusion to which the [university appeal board] has come".<sup>16</sup> The court emphasised that it would not evaluate or weigh the evidence so long as there was some evidence of probative value on which the appeal body could base its decision. It seems that the test of "evidence of probative value" is quite low in this context. In the *McInnes* case, the appeal board relied on evidence from a faculty member not involved with or responsible for the assessment and reports on the student some of which were drawn up after the assessment was made. It should not be difficult, therefore, to produce probative evidence. It may though be wise to document the student's progress and maintain records.

The second category of academic decisions all involve to some extent objective questions of fact. Even a decision to expel a student for low academic achievement might involve a university in considering matters other than his academic record, such as his attendance record or his family or personal history. Some decisions mainly involve questions of fact and judgment such as whether a student's disability merits special treatment at an examination. As these types of cases involve more than academic assessments, courts are prepared to review the procedures by which such decisions are reached.

A number of factors seem relevant in deciding what type of procedures should be required. Again, the effect of the decision on the student's academic career, and perhaps his employment prospects, must be weighed against the desire not to over-burden the university staff with time-consuming procedures which detract them from their teaching and research. One factor that might be decisive is the nature of the decision. Some decisions simply involve the student presenting facts to justify the application of or departure from a university rule or policy. Others involve no dispute over facts or questions of witness

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15. (1982), 140 D.L.R. (3d) 694 (B.C.S.C.T.D.). Affirmed by the B.C. Court of Appeal (1984) 3 D.L.R. (4th ed.) 709. The case confirmed that cross-examination on the subject-matter of the reports was not appropriate.

16. *Ibid.*, per McLachlin J. at 608.

credibility. In such cases universities might be permitted to operate by written submissions if it wishes as the interests of the student can be protected without requiring an oral hearing or cross-examination.

Decisions involving questions of fact or witness credibility are more difficult as these issues are more suited to oral hearings and cross-examinations. However, a full hearing, (perhaps with legal assistance?) would impose heavy burdens on university staff in terms of time. In addition adversarial proceedings might generate antagonism in a small academic community, especially where a person might feel his academic integrity was being questioned or where the protagonists will be expected to continue a teacher-student relationship after the hearing. These factors might suggest that a university be allowed to proceed without allowing cross-examination (or legal assistance which will add to the cost and reinforce the adversarial nature of a hearing). Perhaps an oral hearing with the opportunity to reply and comment on evidence would be an acceptable compromise. Perhaps the whole matter could be dealt with by written submissions giving each side the opportunity of commenting on the other submissions.

The courts do seem to have grasped the distinction between purely academic decisions involving subjective evaluation of academic merit (where they do not intervene) and those decisions which relate to a student's academic career but which involve other, non-academic material. The most familiar example is probably *R v. Aston University Senate ex p. Roffey*.<sup>17</sup> There the examiners in deciding to expel a student considered not only his examination results but also his personal, family and medical records. The court concluded that:

In such circumstances and with so much at stake, common fairness to the students, which is all that natural justice is, and the desire of the examiners to exercise their discretion upon the most solid basis, alike demanded that before a final decision was reached the students should be given an opportunity to be heard either orally or in writing, in person or by their representatives as might be most appropriate.<sup>18</sup>

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17. [1969] 2 Q.B. 538 (D.C.).

18. *Ibid.* per Donaldson J. at p. 554. For a relatively well-known Canadian example of judicial review of academic decisions, see *Re Polten*, *supra* note 12; court could ensure that an examination was fairly and properly conducted although it could not look at the merits of the examination or the standards set by the examining committee.

If the examiners had done so, they would have been made aware of allegations that the students had been misled as to the significance of the examinations and so failed to prepare for them. Other bodies in the universities had felt that this justified giving the students a second chance.

Such statements while reaffirming the possibility of judicial intervention in the area of academic decisions do little to analyse the underlying issues involved or to suggest which blend of factors justifies the imposition of which procedure. Subsequent case law provides some, if limited guidance on this issue.

In *Herring v. Templeman*<sup>19</sup> the applicant sought to contest a decision to expel him because of his poor academic performance. The rules of the institution did provide for an oral hearing before the governing body. The question was what this included. The court analysed the hearing as one designed to give the student the opportunity to demonstrate why, in spite of his poor results, he should not be expelled. In effect they classed it — quite properly — as a case where a student brings forward material to avoid the application of a rule. As such it was not a retrial of the academic assessment. Nor was it to be a full legal trial with examination and cross-examination. In short, all that was needed was opportunity to make submissions.

A similar result was reached in *Brighton Corporation v. Parry*.<sup>20</sup> Again a student who failed to meet the necessary academic requirements argued he should not be expelled, this time basing his claim on the fact that in view of his duties as the student union president he should not be subject to any degree requirements. Willis J. felt that offering the student the opportunity to make written submissions was a fair method of proceeding since that ensured the Board of Governors was fully appraised of the student's argument. Neither of these cases involve the more problematic situation where disputed facts or witness credibility was in issue. It is difficult to predict whether in such a case the courts would still have thought that the simple opportunity to make oral or written submissions was satisfactory.

Similar sentiments have been expressed in Canada. In *King v. University of Saskatchewan*,<sup>21</sup> King failed to obtain the necessary standing for the award of a law degree but argued he should be

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19. *Supra*, note 14.

20. (1972), 70 L.G.R. 576 (Div. Ct.).

21. [1969] S.C.R. 678.

granted one due to special circumstances and for compassionate reasons. Two committees rejected King's appeal without hearing him in person. The Senate, acting through committee, did hear King in person with legal representation. Spence J. declined to consider whether the earlier procedures were fair as any breach that might have occurred were cured by the Senate appeal.<sup>22</sup> Spence J. did have this to say:

The considerations which are given to such an issue are not those which can be assisted by an adversary formula, and it is difficult to conceive of a situation which would have the representatives of a law school faculty confronting the representatives of a student in the trial of an issue as to whether a degree should be granted.<sup>23</sup>

It is not clear whether Spence J.'s belief that adversarial procedures are inappropriate is limited solely to cases where a student seeks to have a particular decision waived by bringing forth additional material. He may be suggesting that the antagonism that might be generated outweigh the advantages of cross-examination in an academic situation even where disputed facts are in issue.

The cases discussed, while they shed some light on what academic decisions might require in the way of procedure, lack clarity and thoroughness of analysis. In particular they seem to fail to appreciate that academic decisions involve different considerations and seem to treat them as one category. To a large extent this might be explicable on the grounds that the cases tended to throw up one type of situation that where a student sought to bring material forward to avoid the application of faculty rule. Even so, it would have been helpful if the courts had made the grounds for their particular decisions more explicit.

### III. *Disciplinary Decisions*

Discipline may be necessary to ensure a climate in which a university can pursue its academic aims of teaching and research but it is largely ancillary to those aims. Few today would agree with the robust comments of Lord Kenyon C.J. in 1794 in confirming the power of the vice-chancellor's court at Cambridge to prohibit the publication of religious pamphlets. "Discipline", he said of a university, "is the

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22. On the question of appeals 'curing' a breach of natural justice or fairness at an earlier stage in the proceedings see *infra* pages 340, 341.

23. In *King's* case, *supra*, note 21, at p. 686.

soul of such body”<sup>24</sup> and universities must have the power “of controlling and checking those evils which, without correction, would be subversive of all discipline in the university”.

There is nothing inherently different about disciplinary matters within a university from those within any other body. The university has no obvious claim to special expertise as it has, for example, in the area of academic evaluation. Consequently, there is no justification for undue judicial deference to university authorities in this area. Naturally, though, a court should have regard to the ramifications upon a university administrative structure of the procedures that it insists be observed. The courts seem aware of the difference between academic decisions and discipline decisions in this respect —although this awareness does not always seem to be translated into a readiness to intervene where necessary.

Among the factors relevant in deciding an appropriate procedure in disciplinary decisions is the severity of the sanction involved. The graver the consequences, the stronger must be the presumption in favour of more stringent procedural requirements to safeguard the individual and with correspondingly less importance attached to administrative convenience. Within a university, sanctions may range from expulsion and suspension down to library or parking fines. Obviously a different approach is required when expulsion is in issue rather than fines for overdue books. Where minor sanctions are concerned, the administrative inconvenience that would be caused by insisting on particular procedures probably negates the need for judicially-imposed procedures. Minor disputes could fairly be viewed as part of the routine of administration, best settled informally, without the use of disciplinary machinery or judicial supervision.

Assuming the matter is a more serious one, attracting expulsion or suspension or heavy fines, a similar latitude to university administrative inconvenience may not be forthcoming. Such matters belong firmly in the disciplinary process and the court is well suited to supervise the procedures used. All of that is not to say that the courts should not take into account the restraints to which the university administration is subject. The nature of the dispute is again highly relevant; where facts are disputed and the credibility of witnesses challenged more adjudicative procedures such as cross-examination

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24. In *R. v. Chancellor of Cambridge University* (1774), 6 T.R. 89 at 106; 101 E.R. 451 at p. 460.

may be needed. These considerations need to be weighed against the strain and hostility that such procedures may cause in a small, closed community. However, the likelihood of this occurring should be realistically evaluated. Where a person is threatened with expulsion it would seem that such reasons be not used to deny him the fullest opportunity for defending himself. Where the facts are largely agreed, however, and a student is simply making a plea of mitigation the need for harmony may suggest cross-examination is not so vital. None of this should operate as a bar to informal attempts to resolve matters but adequate machinery should exist where needed or requested.

Judicial willingness to involve themselves in university discipline dates back as far as 1723 with the famous case of *Dr. Bentley*.<sup>25</sup> There the university removed Dr. Bentley's degrees because of his alleged contempt of the Vice-Chancellor's court. The court upheld a complaint that Dr. Bentley had been given no notice of the proceedings and not been given a chance to appear and defend himself. *Mandamus* issued to restore Dr. Bentley to his degrees, with the court stressing the fundamental importance of a hearing in such cases. One judge, Fortescue J., picturesquely saw divine parallels in the matter, commenting:

I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God), where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.<sup>26</sup>

Modern cases have reaffirmed that need to observe procedural fairness in disciplinary hearings but have provided little analysis of the exact types of procedures that are appropriate. In *Glynn v. Keele University*<sup>27</sup> a student was accused of nude sunbathing on campus. The Vice-Chancellor in whom disciplinary authority vested, fined him £70 and expelled him from the university residences. The student was informed of the penalty by letter and told of his right to appeal but no opportunity for a hearing of any kind was given before the initial decisions was taken. In his judgment, Pennycuik V.C. distinguished between those instances where there was a need to impose

25. *R. v. University of Cambridge* (1723), 1 Str. 557; 93 E.R. 698.

26. *Ibid.*, at p. 567, 704.

27. [1971] 1 W.L.R. 487 (Ch.).

penalties to enforce discipline but where there was only a moral obligation to be fair and those instance where (in the language of judicial review of the time) the university was acting “quasi-judicially” and so subject to judicial supervision. This seems no more than the distinction between minor and major offences suggested above. Exclusion, affecting the position of the student in the university, naturally fell within the more serious category and such decisions had to comply with the requirements of procedural fairness.

Having made this initial distinction, Pennycuik V.C. had to consider the procedures that the university should have adopted. Unfortunately, his judgment is unclear on this issue. Pennycuik V.C. suggested that the Vice-Chancellor should have sent for Glynn before he left the university for the summer and given him the opportunity to present his case. This suggests that an oral hearing will normally be appropriate. There was no mention of the bringing of witnesses or cross-examination. This could mean that, as no hearing of any kind had been given so procedural fairness was clearly not observed, there was no need to spell out detailed procedural requirements. Or Pennycuik V.C. might have considered that cross-examination was not required as a rule for these decisions. Or, as the case proceeded on the assumption that there was no dispute as to whether Glynn was involved and no question of disputed facts or identification, all that might have been necessary was to give Glynn the opportunity to claim mitigating circumstances or argue that nude-sunbathing was an acceptable pastime. In such circumstances, cross-examination might not be necessary. The basis of Pennycuik V.C.’s judgement is not clear.

In addition, assuming that the case was simply one of a plea of mitigation, one would have thought Pennycuik V.C. would have considered the adequacy of written submissions in the circumstances. Assuming Glynn had already left Keele for the summer, the added inconvenience of arranging an oral hearing might have justified a written hearing. The same would by no means be true of a disputed offence where it may be necessary to wait until the university reconvenes and all witnesses are available before a hearing goes ahead.

Unfortunately, the court failed to rise to the occasion and failed to deal with the issues. More unfortunate still is the failure of the court to explain why the issues were not being dealt with — which leaves the ultimate result shrouded in uncertainty.

Another opportunity for judicial clarification was missed in *ex p.*

*Bolchover*.<sup>28</sup> A post-graduate student was expelled after certain disturbances during which he allegedly assaulted a marshall. Among the facts complained of were: failure to inform him of which incidents he was charged with; absence of legal assistance; refusal to allow a short-hand writer to be present so the student had to take his own notes and could not give proper instructions to his advisor; cross-examination was restricted. At least some of these merited consideration but in a briefly reported judgment we are told only that the court found the hearing was not unfair although another tribunal "would have been ideal". It is impossible to deduce whether the allegations were not substantiated or whether the procedural rights claimed were inapplicable. No indication is given of what rights the student was given except that one can deduce from counsel's argument that he had an oral hearing and was allowed the assistance of a friend.

Canadian authorities are perhaps a little more helpful but again they fail to give a detailed analysis of the issues involved. In *Walls v. Commissioners of Saint John General Hospital*,<sup>29</sup> a nurse was dismissed for alleged incompetence and irresponsibility. She was interviewed — but not informed that she might be dismissed. At a later committee hearing she was not fully informed of the allegations. Stevenson J. concluded that she had been denied a fair hearing. While this reconfirms the need for notice and to be told the substance of the allegations, it fails to particularise the procedures to be used at a hearing. It may be that, having found a breach of natural justice, Stevenson J. felt it was unnecessary to go further. Perhaps the common law tradition of restricting a decision to the facts of the instant case stands in the way of developing a generalised code of fair procedure.

The need for a certain degree of flexibility in the procedures used was emphasised in *Re Schabas and the Caput of the University of Toronto*.<sup>30</sup> Disciplinary hearings before the Caput, the university disciplinary tribunal, were regulated by statute<sup>31</sup> and the value of this case in gauging common law natural justice requirements is limited. Nevertheless, it does seem implicit in the judgments that an oral hearing and cross-examination may be necessary. More important,

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28. The Times, October 7th, 1970.

29. (1973), 9 N.B.R. (2nd) 106 (N.B.S.C.Q.B.).

30. (1974), 52 D.L.R. (3rd) 495 (Ont. H.C. Div. Ct.).

31. Statutory Powers Procedure Act, 1971, S.O. 1971, c. 47.



Pennell J. emphasised that a tribunal has a discretion to exclude irrelevant or redundant cross-examination. If a tribunal is to function effectively it must surely be able to exercise a degree of control over the proceedings — but a court, too, should ensure that discretion is used properly. If it is used to exclude relevant as opposed to repetitious or irrelevant evidence a court should treat that as a denial of a fair hearing. This was done in a recent prison discipline case,<sup>32</sup> and what is appropriate for prisoners should at least be available for students.

The case-law on university discipline does little to shed light on what procedures should be used, or even what factors are relevant in deciding this. There seems a reluctance to interfere in university matters which is reflected in the marked lack of clarity and precision in the judgments. While basic distinctions have been drawn, notably between serious and minor offences, little else has been clarified.

#### IV. *Academic Offences*

Universities naturally seek to protect their academic integrity and reputation by outlawing activities such as plagiarism, cheating and obtaining qualifications and admission by deception. Sanctions imposed may range from denial of credit in a particular course to expulsion. Academic discipline can be viewed as part of the general disciplinary powers of a university. It involves findings of fact and the imposition of sanctions. At the same time, such offences are bound up with the essentially academic nature of a university. In deciding whether an offence has occurred expertise in the subject-matter or familiarity with a student's academic capabilities may be useful. Consequently it seems wise to deal with academic discipline separately. This division is borne out by the practice of universities which frequently establish a separate committee to deal with academic offences.

There is not a great deal of case-law involving such matters and no express recognition in the judgments that academic discipline is a separate category of decisions. The issue did arise in *Ceylon University v. Fernando*<sup>33</sup> where a student was accused by another student of having prior knowledge of examination questions. Fernando and the student making the allegations were interviewed separately. Fernan-

32. *R. v. Hull Prison Board of Visitors ex p. St. Germain* (No. 2), [1979] 3 All E.R. 545 (C.A.).

33. [1960] 1 W.L.R. 223. (P.C.).

do argued that he should have been present at the questioning and allowed to cross-examine the student. The Privy Council held that a fair opportunity to contradict the evidence was required but that a failure to inform Fernando that he might cross-examine the student was not a breach of natural justice. But the Privy Council suggested that if Fernando had requested cross-examination and been refused then there might be a stronger case that Fernando had been treated unfairly. De Smith has strongly criticised this aspect of the judgment.<sup>34</sup> As he says, either cross-examination was required by natural justice in this context, in which case the student should be informed of his rights. Or cross-examination was not a requirement in which case the fact that the defendant had requested it would make no difference.

There certainly seem strong arguments for allowing cross-examination, at least where disputed facts or witness credibility is in issue. The consequences of a finding that an academic offence has been committed are usually grave — Fernando was denied a first class honours degree. In addition, there is the moral obloquy attached to findings of cheating or plagiarism. The Privy Council recognised that the student making allegations in the *Fernando* case “was the one essential witness against [Fernando], and the charge in the end resolved itself into a matter of her words against his”.<sup>35</sup> Surely these are the very circumstances when cross-examination is most useful, where there is a limited question involving witness credibility and disputed facts.

It is difficult to regard the *Fernando* case as particularly persuasive. The judgment concentrates on whether a failure to grant cross-examination rights where they are requested is a breach of natural justice rather than assessing whether cross-examination is a right. The case was decided in 1960 before the “revival” of judicial supervision of administrative action.<sup>36</sup> It reflects a readiness on the part of the courts to allow administrative bodies to function as they wish, with the courts exercising only a residual control in cases where an administrative body gives no kind of opportunity for the individual to state his case. Nowadays the courts should be more directly involved

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34. (1960), 23 M.L.R. 428.

35. *Supra*, note 33, at p. 235.

36. Although it is interesting to note that De Smith believed the balance to be tilted marginally against allowing cross-examination *supra* note 34 at page 431. Even changes in attitude may not necessarily mean a different result would be reached today.

in structuring the exercise of power and in particularising the procedural requirements necessary in any given context.

None of the cases discussed in the area of university discipline gives much assistance in predicting what procedural requirements a university must observe. Certainly where the sanction is a severe one, the student must be informed of the substance of the allegations and given the opportunity to respond. This, it seems, will normally require an oral hearing. However the courts have not considered the necessity of allowing witness, cross-examination or perhaps, even legal assistance.

This judicial reluctance to spell out the requirements of procedural fairness may result from the fact that these cases were decided at an early period in the revival of judicial review. More recent and analogous cases suggest a more robust attitude on the parts of the courts. *Kane v. Governors of the University of British Columbia*<sup>37</sup> concerned disciplinary action against a professor. Dickson J. stressed that "a high standard of justice is required when the right to continue in one's profession is at stake".<sup>38</sup> Consequently, the Board deciding the case should not have held private interviews with witnesses nor heard any evidence in the absence of one of the parties. In a British prison case,<sup>39</sup> Geoffrey Lane L.J. said that in disciplinary offences involving potentially serious consequences, the right to be heard will include the right to bring witnesses where the proceeding is designed to establish innocence or guilt. Cross-examination may also be necessary depending on the nature of the evidence. He cited the example of evidence relating to identification as being suitable for cross-examination. Any issue involving disputed fact or witness credibility will also probably fall into this category. The chairman does have an overall discretion to disallow witnesses or cross-examination but must exercise this discretion "reasonably in good faith and on proper grounds". These statements are surely no less applicable to university discipline than they are to prison discipline.

#### V. *The Rule Against Bias*

The twin pillar of the right to a fair hearing is the right to an unbiased and impartial decision. A decision will be invalidated if the surrounding circumstances create a reasonable apprehension that there is a

37. [1980] 1 S.C.R. 1105.

38. In *Kane's case*, *supra*, note 37 at p. 1113.

39. *R. v. Huil Prison Visitors Board ex p. St. Germain*, *supra*, note 32.

likelihood of bias.<sup>40</sup> Particular problems arise in applying this principle to universities because of their institutional structure. Universities are quintessentially “government by committee”. The practice is for a wide range of functions to be vested in a Senate or Board of Governors. They delegate a number of decisions to the individual faculties which in turn frequently establish committees either to make recommendations to faculty or to make decisions and report these to faculty. Cross-membership of university bodies is common in universities. The same person may teach a student, sit on a committee to hear a student’s complaint, attend a faculty meeting to consider the committee’s findings and be eligible to attend Senate meetings where the matter may ultimately be decided. The extent to which such cross-membership contravenes the rule against bias obviously has great significance for the structure of university administration.

In considering the problem of bias in a university the distinction between the types of decisions made should be borne in mind. There might be different results depending on whether the cross-membership occurs in considering an academic grievance, a disciplinary matter or an alleged academic offence. What may constitute bias in one setting may be excusable in another.

A more fundamental distinction may rest on the functions performed by the various committees. A committee may be a fact-finding body which gathers information and presents a concise report to a larger body (such as Faculty Council or Senate) which may be too large and unwieldy to perform this task itself. The parent body may make the actual decision. If members of the committee participate in the parent body’s deliberations does this create a presumption that the parent body was biased in favour of the committee’s report and so failed to give it genuinely impartial consideration? A great deal may depend on whether the initial committee reports facts, makes recommendations or is the effective decision-maker with approval of the report being a formality.

Alternatively, the committee structure may be appellate in nature. The committee may have jurisdiction to make a decision. This might be appealed to Faculty Council and thereafter to the Senate. Can a person who takes a decision also hear an appeal against his decision — and would this operate to stop all faculty members from attending a Senate appeal against a decision of Faculty Council?

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40. The test is discussed extensively in *Metropolitan Properties v. Lannon*, [1969] 1 Q.B. 577 (C.A.).

There is surprisingly little consideration of this problem in the United Kingdom. It seems to have been accepted without discussion in *Osgood v. Nelson*<sup>41</sup> that members of a committee which investigated a complaint, gathered evidence and made a report could sit on the parent body which took the decision. The matter was not raised directly.

Canadian cases have dealt more fully with the question of bias both generally within committee structures and specifically within a university context. The leading case is probably *Law Society of Upper Canada v. French*<sup>42</sup> where a lawyer was charged with disciplinary offences. The matter was investigated by a disciplinary committee which found him guilty and recommended to Convocation, the parent body, that he be expelled. Two members of the committee participated in the deliberations of Convocation. Two views on the propriety of this emerged from the judgments.

Spence J. for the majority drew a distinction between situations where there is an appeal from one body to another where membership of both bodies would create a presumption of bias. Where there was a two-stage process with firstly an investigation and report by one body and consideration and disposition of that report by another body, membership of both would be permissible.

The minority judgment, which is in many ways more convincing, felt the issue could not simply be resolved by characterising the process as appellate or as a two-stage inquiry. They felt the real distinction was whether the body not only found facts but also drew conclusions as to guilt and made recommendations as to penalties. In such circumstances to allow cross-membership would mean that some members of the parent body would have preconceived ideas on the matter and so it would not seem to be giving a completely impartial consideration of the issues. This is the principle which seems most clearly to accord with the underlying rationale of the rule against bias — that no one who has been involved in making findings of guilt should participate in the final decision. The desire to ensure that justice be done surely overrides arguments that logically where there is an inquiry and a later decision this is all part of one process. The two stages of the process are physically separate and it may be preferable to preserve this separation in the area of committee

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41. [1872] L.R. 5 H.L. 636.

42. [1975] 2 S.C.R. 767.

membership by refusing to allow duplication.

Whatever the correctness of this basic distinction, it is not clear that it can simply be transplanted into the university context. An earlier case, *King v. University of Saskatchewan*,<sup>43</sup> had already considered the problem in the university context. This involved the refusal of a degree for failure to meet the requirements, an academic matter, not a disciplinary one. Three separate committees considered the issue before it reached the Senate Appeal Committee with duplication of membership arising at each stage including the final one. Technically, the Senate alone had jurisdiction to award degrees and it would have been possible to regard the previous committee "decisions" as recommendations. However Spence J. throughout dealt with the matter as if the process were appellate in nature and that the Senate was an appeal body. He seemed to suggest that, given the nature of a university as one community and the structure of university government, duplication of membership was inevitable. Consequently, he refused to treat that as raising a presumption of bias. If cross-membership is permissible in appellate procedures, it would, one presumes, apply *a fortiori* to bodies which make recommendations. Spence J. does not say whether the judgment applies only to academic matters — where, perhaps, duplication might be expected to occur more frequently — or to disciplinary decisions also.

In *French's* case, Spence J. referred to his judgment in *King* which he said must "be understood as applying only to its particular circumstances".<sup>44</sup> Unfortunately he failed to make it clear which particular circumstances he meant. There are three possibilities. Firstly, did Spence J. mean the rule against duplication of membership in appellate proceedings did not apply to university bodies generally. If so duplication could never invalidate decisions whether academic or disciplinary whether proceedings are appellate or recommendatory. Secondly, did he mean the rule did not apply to academic decisions only, so academic appeal procedures could not be vitiated by cross-membership (recommendatory proceedings for both academic and disciplinary decisions would not be invalidated by cross-membership by analogy with Spence J.'s reasoning in *French*). Finally, is *King* limited to the fact that the Senate had original jurisdiction and the other bodies could be regarded as recommendatory — so duplication did not raise the presumption of bias — but if the proceedings had

43. *Supra*, note 21.

44. *Supra*, note 42 at p. 783.

been appellate in nature the decision might have been invalidated? This would bring universities into line with the position in other bodies, where recommendation proceedings in academic and discipline matters would not be invalidated by cross-membership but appellate procedure would be invalidated.

Given that the ambiguity in the judgment leaves room for manoeuvre, its interpretation is largely a matter for personal choice based on one's view of duplication of membership. There seem to be no convincing reasons why appeal decisions in disciplinary cases should not be vitiated where cross-membership occurs. There is nothing inherently different about a disciplinary decision in a university as compared with other institutions. Therefore, it would seem that the general presumption against allowing cross-membership in disciplinary appellate procedures should apply. Such cases are relatively rare: it should not be difficult to set up a small committee to deal with such affairs. There seems no real threat to the smooth running of university affairs if the members were subsequently excluded from appeals against their decision. They are not being disbarred from participating in the mainstream of university government as discipline is surely a peripheral concern.

Academic appeals may perhaps cause more difficulty. They are different in nature from other decisions. They normally do not involve findings of fact or fix guilt; rather they tend to involve considering applying, or granting an exemption from, a rule. Even so, if a person participates in that decision he is surely likely to take his prejudices in favour of the decision to the appeal body. There is nothing in the nature of the decision which dispels the underlying rationale of the rule, that a person should not sit in judgment on his own decisions as he is likely to appear prejudiced in favour of the earlier decision. It may be that the volume of decisions and inability to find members of staff to serve on each committee makes duplication inevitable. But again a small committee could be set up to consider initial decisions and its members precluded from participating in the appeal body's deliberations. It is difficult to see how fears of administrative inconvenience pose any real problem. In principle it seems that any rule preventing duplication of membership in the appellate process should apply to academic decisions.

A problem might arise where a student appeals the decision of his department or faculty outside that unit to a university body. Obviously the supervisor, examiner or re-reader should not be entitled to sit on the university body as they are connected with the particular

student and decision in question. Some remarks of Spence J. in *King v. University of Saskatchewan*<sup>45</sup> suggest the rule against bias demands more than that. In concluding that no bias existed where there was duplication of membership, Spence J. thought it "significant" that no member of the faculty involved was a member of the committees that considered the appeal. Does this mean that when a Senate or one of its committees hears an appeal no member of the relevant academic unit, the faculty or perhaps in large faculties such as Arts and Sciences, the department, should sit on the appeal board? It is arguable that a student might feel that the presence of a member of the very group he is challenging necessarily indicates a bias in favour of the existing decision. Perhaps fairness might more easily be seen to be done if there was a strict separation of faculty and university at the university level. Conversely, it is arguable that the presence of a faculty member would be useful as he could explain the procedures or policies of the faculty but this could easily be obtained for example by asking the Dean to provide a written memorandum on faculty procedures or policy.

#### VI. *The Rule Against Delegation*

The institutional structure of universities with its tendency to vest powers initially in a Senate or Board of Governors and thereafter to delegate these powers to the faculty who in turn delegate them to a committee causes problems in other areas of administrative law. There is a presumption in administrative law that where a statute vests discretionary power in a particular body that body itself must exercise the power.<sup>46</sup> Delegation to another body unless authorised by statute is *prima facie* unlawful and any purported exercise of the delegated authority is invalid. This is, though, only a rule of construction and it only creates a presumption against allowing delegation. Where the reasons underlying this insistence on non-delegation are absent, or where the nature of the statutory scheme suggests that delegation is permissible, the presumption may be rebutted. The problem lies firstly in deciding which categories of decisions must the statutorily designated body retain for itself, and second where it does retain a particular decision-making power which, if any, aspects of the decision-making process may still be delegated.

45. *Supra*, note 21.

46. See generally De Smith *Judicial Review of Administrative Action* (4th edition) pages 298-309. Wade *Administrative Law* (5th edition) pages 319-329 and see Willis: *Delegatus non Potest Delegare* (1943), 21 Can. Bar Rev. 257.



The statute itself may well authorise delegation.<sup>47</sup> Whether it has done so and on what conditions is itself a matter of construing the particular statute. In the absence of express authority it is necessary to look at the nature of the function involved and the general scheme of the statute to see if delegation is permissible. It is often asserted that “judicial” functions are not normally delegable. As “judicial” has proved to be a confusing term, it is probably best to look at the types of decisions to which this epithet was applied and the reasons for holding the particular function to be non-delegable.

Disciplinary functions have normally been regarded as exercisable only by the person designated. The classic case is *Vine v. National Dock Labour Board*<sup>48</sup> where a local board delegated its disciplinary functions to a disciplinary committee. The House of Lords held that the board itself had to decide, emphasising the seriousness of the decision — a man could be dismissed from his employment. They also stressed that the board was carefully balanced in membership between employers and employees which reinforced the presumption that the statute contemplated the board itself deciding these disputes.

It is possible to argue that disciplinary procedures within a university are equally important and should not be delegated to committees unless authorised. Such a view, though, would be unrealistic in many circumstances. There is nothing to indicate that Senate is specifically suited because of membership or attributes to perform disciplinary functions. Indeed the Senate will often be a large, somewhat unwieldy body not particularly suited to perform fact-finding exercises. (This, of course, could be used to justify only allowing Senate to delegate the fact-finding part of the decision-making process; it does not necessarily justify delegating the decision-making power). It is perhaps more realistic to view the founding statute as creating a self-regulating community, endowing the Senate with legislative powers which it can allocate to such bodies as it thinks appropriate. This would be preferable to treating the statute as setting out a

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47. See for example *Dalhousie University Act*, S.N.S. 1969, c. 127, s. 1 amending s. 7 of S.N.S. 1863, c. 24 to allow for delegation of disciplinary functions within *Dalhousie University*; *Mount Saint Vincent Act*, S.N.S. 1966, c. 124, s. 17(3), power for Senate to delegate any of its powers.

48. [1957] A.C. 488 (H.L.). See also *Barnard v. National Dock Labour Board*, [1953] 2 Q.B. 18 (C.A.) delegation of local committee's disciplinary functions to port manager unlawful. *R. v. College of Physicians and Surgeons of British Columbia ex p. Ahmad* (1970), 18 D.L.R. (3rd) 197 (B.C.C.A.), unlawful to delegate power to determine if physician had adequate skill.

limited scheme with powers carefully allocated between the particular components.

In matters of academic decisions, it would be impracticable to interpret the general regulating power given to Senate as a direction that it personally take all decisions. Decisions as to whether a student passes or fails; if there are special circumstances justifying special examinations or aegrotat degree standing must largely be left to departments or faculties. The Senate would still be able to control general academic policy, but the sheer volume of decisions make the concept of individualised consideration by the Senate unworkable.

Little attention has been paid in the British and Canadian case-law to the problems that a strict application of the principle might create for universities. Specific recognition of the problem is seen in an Australian case, *Re University of Sydney ex p. Forster*.<sup>49</sup> The case involved an academic matter, the power to consider students' applications not to be dismissed from the university in the light of their academic performance which had been delegated to a committee. The court said that:

The object of the statute is the entire management of and superintendence over the affairs of a university, an object which necessarily involves the making of, amongst others, myriad decisions affecting individual students, frequently in exigencies occurring between meetings of the Senate. . . . Without the most ample facility for delegation the affairs of a university could not be carried on at all.<sup>50</sup>

This realism might be borne in mind when considering the legality of delegation.

There may be occasions when the statute specifically indicates that a specific body take a decision or provides for an appeal to Senate. In such circumstances, the question is raised of the extent to which the body in question can delegate certain aspects of its decision-making function. *Jeffer v. New Zealand Dairy Production and Marketing Board*<sup>51</sup> considered this in the context of the Dairy Board's zoning powers. A committee was established to investigate the problems, but only made recommendations and did not provide a summary of the evidence taken nor the written submissions. This was not sufficient as the Board was not fully informed of the evidence and so was not in a

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49. [1963] S.R. 723 (N.S.W.).

50. *Ibid.*, at page 733.

51. [1967] A.C. 551 (P.C.).

position to make a considered decision. It remains to be seen whether the same stringency will be demanded of a university senate seeking to gather facts by means of an investigate committee.

There seems no reason why a university senate, the effective "legislature", should not be free to delegate many of its functions. One cautionary note should, perhaps, be added. When a committee becomes the effective fact-finding or deciding body, the procedures the committee should be required to follow are the procedures that the Senate itself might have had to observe. There is a danger that first the courts will allow a Senate to delegate fact-finding tasks and then conclude that as the committee merely "recommends"<sup>52</sup> and does not "decide", the strict rules of procedure can be relaxed at the committee hearing. This might deprive a student of the appropriate hearing and would be unfair. Realism about the structure of university decision-making should extend beyond the applications of principles of non-delegation. The courts should locate the effective decision-making centres rather than the formal ones and subject those to judicial scrutiny.

## VII. *Potential Bars to Judicial Review of University Affairs*

### (i) *The Visitor.*

The Visitor is a university functionary who, theoretically, stands at the apex of the university hierarchy. His importance lies in his sole and exclusive jurisdiction over "whatever relates to the internal arrangements and dealings. . . of the institution".<sup>53</sup> The history and case law surrounding the visitor has been thoroughly researched elsewhere.<sup>54</sup> Some of the legislation establishing particular Canadian universities have, perhaps unwittingly, endowed them with a university Visitor, often possessing full visitatorial powers.<sup>55</sup>

Given the exclusive nature of the Visitor's jurisdiction, it becomes important to determine the extent of that jurisdiction and to assess

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52. See for example *Herring v. Templemen*, *supra*, note 14 where the court seemed to fall into this mistake. One of the reasons for relaxing the procedural requirements was said to be that the committee in question merely "recommended" a course of action to the governing body. In fact the committee made a conclusive decision on the academic merits of a complaint which would not be re-examined by the governing body.

53. Per Kindersley V.C. in *Thomson v. University of London*, *supra*, note 7.

54. *Supra*, note 6.

55. In Canada see, for example, *An Act Respecting the Memorial University of Newfoundland* R.S.N. 1970, c. 231 s. 9; *University Act*, R.S.B.C. 1979, c. 419 s. 2. In New Zealand, for example, see the *University of Auckland Act*, 1961, c. 50 s. 5.

what matters can properly be regarded as questions of internal administration. Of particular interest here is the question of whether visitorial jurisdiction extends to adjudicating on alleged procedural unfairness, or, to put the matter another way, whether it is the Visitor or the courts who possess the power of procedural review of university affairs.

In the student context there are a number of cases declaring purely academic matters — challenges to examination results and the like — to be an internal matter for the Visitor to deal with.<sup>56</sup> As the courts would not be in a position to review these matters, it makes sense to exclude the courts and hand the matter to some other body. Even in institutions not possessing Visitors, the courts have declined to intervene in purely academic matters.<sup>57</sup> There is as yet no decision extending the Visitor's jurisdiction to matters involving procedural fairness in the academic sphere or the disciplinary one.

In principle, it would seem possible to hold that procedural review whilst it must necessarily be performed within the context of a university's internal administration is not part of it. "Internal" could easily be viewed as meaning something to do with the "essence" of a university or involving matters unique to a university's academic purpose. Insistence on procedural fairness is not something unique to universities but is rather part of the general public law. As such responsibility for ensuring it is observed should rest with the courts.

There are some suggestions, however, that the courts will not follow this interpretation of "internal" but rather will look to see if the subject matter is one relating to the internal administration. If it is, then it will fall within the jurisdiction of the Visitor for all purposes including adjudication on alleged breaches of natural justice. Brightman J. at first instance in *Herring v. Templeman*<sup>58</sup> felt the expulsion of a student for academic reasons was within the Visitor's jurisdiction, even though it involved alleged breaches of natural justice (in this case, that the student had not been given an opportunity

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56. See for example *Thomson v. University of London*, *supra*, note 7, *Thorne v. University of London*, *supra*, note 11 and text.

57. See *Re Polten* case, *supra*, note 12 and text.

58. [1973] 2 All E.R. 581 (Ch.). The Court of Appeal felt the question could not be answered as the institution there was set up by trust, and was not a corporation. Unsure of the position of the visitor in such institutions, they affirmed Brightman J.'s decision on other grounds and declined to consider the matter. [1973] 3 All E.R. 569 (C.A.). See Christie, *A Problem of Jurisdiction and Natural Justice* (1974), 37 M.L.R. 324.

to produce reasons for not expelling him). A Canadian case involving an appeal against refusal of tenure has also been held to fall within the jurisdiction of the Visitor even though it involved allegations of breach of natural justice.<sup>59</sup>

In principle, the institution of the Visitor seems objectionable. Attempts have been made to equate the Visitor with "a domestic tribunal which can determine the matter informally, cheaply and speedily".<sup>60</sup> This analogy is fallacious. Administrative tribunals are created to make substantive decisions. Their procedures are reviewable in the courts. In the universities it is the universities which take the substantive decisions — but rather than leave review of their procedures to the courts, advocates of the visitorial jurisdiction argue that it be given exclusively to the Visitor. It is difficult to see why students should be denied the access to procedural review in the courts that other citizens enjoy. It is to be hoped that the Visitor meets the same fate in other Canadian provinces that he met in Alberta where the legislature moved swiftly to abolish him on his re-entry into the legal world.<sup>61</sup>

#### VIII. *Exhaustion of Internal Remedies*

The most potent bar to obtaining judicial review of university affairs is connected with the hierarchical committee structure which exists in most universities. Frequently, student grievances are dealt with at a departmental level and may be appealed or reconsidered at faculty and perhaps Senate level. Given the reluctance of the courts to scrutinise university administration<sup>62</sup>, they may prefer the problem to be considered first by the university community before considering it in the courts. This involves two separate questions. First, can a later hearing or appeal conducted in accordance with the principles of

59. *Vanek v. Governors of Alberta*, *supra*, note 2. The legislature in response to the case abolished the institution of the visitor. Universities Amendment Act S.A. 1976, c. 88; see now R.S.A. 1980, c. U-5, s. 7. A recent unsuccessful attempt to invoke the visitorial jurisdiction arose in *Casson v. University of Aston in Birmingham* [1983] 1 All E.R. (A decision of the Lord Chancellor acting as visitor.)

60. By Megarry V.C. in *Patel v. Bradford University Senate* [1978] 1 W.L.R. 1488 at p. 1497.

61. *Supra*, note 59.

62. This reluctance was re-iterated in two recent university cases; see *Re Paine and University of Toronto* (1981), 131 D.L.R. (3rd) 325 esp. the comments of Weatherston J.A. at page 331 and *Re Bezeau and Ontario Institute of Studies* (1982), 134 D.L.R. (3rd) 99 esp. per Galligan J. at p. 104. (The cases involved faculty tenure appeals but both courts referred to student cases as supportive of a general reluctance to interfere in university affairs).

natural justice "cure" a defect or breach of natural justice in an earlier hearing. Secondly if this is possible should the courts require students to exhaust all possible remedies within the university before making an application of review.

The Canadian and British courts differ widely in their views of the problem. A Canadian university case, *King v. University of Saskatchewan*,<sup>63</sup> seems to lay down the general principle that a later, properly conducted appeal can cure an earlier, defective hearing. The case involved an appeal against the refusal of a degree which eventually reached Senate. Although Senate technically had sole responsibility for the granting of degrees, the Supreme Court throughout treated the process as appellate and there is no reasons to doubt that they intended to lay down a general principle. It is fair to say, however, that the issue was never fully considered and no reasons for the principle were given. The result of the principle would seem to be that a person who receives a fair, but unfavourable, consideration by an appeal body will be denied judicial relief. Thus a student who opts for an appeal hearing hoping that it will be favourable and thus as a practical matter obviate the need to go to the courts, now runs the risk, in Canada at least, that a fair but unfavourable decision precludes judicial relief.

The British courts in *Leary v. National Union of Vehicle Builders*<sup>64</sup> came to a different view. Megarry J. held that as a general rule "a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in the appellate body". There seemed to be three underlying reasons for this decision. First, appellate bodies differ in composition and approach from the trial body. In the university context (particularly where decisions involve academic matters there is, as Dickson J. points out in his dissent in *Re Harelkin and the University of Regina*<sup>65</sup> "a world of difference" between faculty bodies and Senate (and also, where the faculty is an umbrella one such as Arts and Sciences between the department and other appellate bodies). The faculty (or department) is the effective decision-maker and it is composed of people familiar with the area of work in question, familiar perhaps with the student and especially with

63. *Supra*, note 21. See also *Re McInnes and Simon Fraser University*, *supra* note 15. 15.

64. [1971] 1 Ch. 34. See also the strong dissent of Dickson J. in *Re Harelkin and the University of Regina* (1979), 96 D.L.R. (3rd) 14 which supports the British view.

65. In the *Harelkin* case, *supra*, 64.

faculty policy and previous decisions in similar situations. It is difficult to see how a fair hearing at a higher level can compensate for deficiencies at the lower, but critical, level.

Second, at the appellate level, the student has to contend not only with the evidence against him but also one or more decisions unfavourable to his arguments. There may be a natural reluctance on the part of appellate bodies to overturn such decisions<sup>66</sup> — thus the student has a more difficult task in having the decision reversed. Frequently the burden of proof is reversed and it is the student who has to prove the incorrectness of the earlier hearing. It is difficult, given this, to conclude that a fair appellate hearing compensates for the deficiencies at the initial hearing where, in many ways, it is more important to ensure fair procedures.

These arguments seem strongly to support the idea that defects in a hearing should not be curable by properly conducted appeals.<sup>67</sup> As a later appeal cannot rectify earlier procedural misdemeanors there seems little point in compelling a student to exhaust internal remedies. It may be that a favourable decision would remove the need to go to court but the student should be able to choose between going to court immediately or appealing within the university in the hope of receiving a favourable hearing. The student might even suggest to the appeal body that the earlier unfairness is a reason to overturn the appeal. The choice would seem to be the student's and there would not, in the United Kingdom, be a requirement of exhaustion of internal or alternative remedies.<sup>68</sup>

The position in Canada seems very different, largely because of the belief that an appeal hearing can cure earlier defects. In that setting it becomes more important to decide if a student must first use all the remedies offered by the university as a favourable or unfavourable decision, so long as the appeal is fairly conducted, precludes judicial relief. In *Re Harelkin and the University of Regina*<sup>69</sup> the Supreme

66. Described by Dickson J., *ibid.*, at p. 32 as 'the dynamic of ascending rigidity'.

67. As a caveat one should note the decision of *Calvin v. Carr* [1979] 2 W.L.R. 755 (P.C.) which suggests that in some circumstances an appeal might cure an earlier defect. The court seemed to have in mind situations where the initial decision must be given instantly as in that case which involved horse racing where a decision to disqualify a horse had to be given on the spot. The latter 'appeal' in such instances comprises the first full hearing. This of course is not normally the case in university decision-making.

68. This is the conclusion reached both by De Smith, *op. cit.*, note 46 at p. 154 and Wade, *op. cit.*, note 46 at p. 593-598.

69. *Supra*, note 64.

Court addressed itself to the question of developing an exhaustion of internal remedies rule within a university.

The majority of the Supreme Court decided to reject the student's application for review and to confine him instead to pursuing an internal appeal to the Senate. The majority first established the discretionary nature of the prerogatives, rejecting arguments that this discretion was almost non-existent where a breach of procedural fairness had occurred.<sup>70</sup> Having achieved this dubious position the majority then considered whether to refuse to exercise their discretion to grant a remedy. Beetz J. felt this issue depended on the "balance of convenience" a concept that has never before been referred to in the context of prerogative remedies but rather seems an import from the private law area of interlocutory injunctions.<sup>71</sup> In deciding where the balance of convenience lay, Beetz J. suggested that regard be paid to a number of factors: procedure on appeal, composition of the various bodies, powers and likely manner of exercise, cost, expeditiousness and so on. All these factors are relevant but to the question of what procedural fairness requires in the circumstances not to the question of whether a remedy should be awarded. In truth, the test is out of place here. What the courts are doing is making a final, not a temporary judgment, on whether a person's rights to fair procedure have been infringed. If so, a remedy should be awarded unless there is some unusual reason why it should not. This is the traditional understanding of the law and there has never previously been any suggestion that the enforcement of rights is subject to a "balance of convenience".

In considering whether an appeal to a Senate was an adequate alternative remedy, Beetz J. makes other errors of reasoning which deserve to be noted. First, he feels the Senate appeal would be conducted as a trial "de novo" as there was nothing to indicate that records would be transferred from the lower to the appellate tribunal and he felt that such records would be inadequate to hear an appeal. Yet this is exactly what happens frequently. Large bodies such as Senate often rely on transcripts of earlier proceedings and written submissions. If Beetz J. is right and such material is inadequate that

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70. For reasons of space, the flaws in the reasoning underlying this position, which was forcefully dissented from by the minority, will not be considered.

71. See *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 (H.L.). Beetz J. himself did not refer to this similarity; indeed he fails to give any authority or justification for his test.



is all the more reason for holding that an appeal to Senate is no substitute for earlier defective hearings. Alternatively Senate would have to change its role to that of a fact-finding rather than deliberative body something it is not suited for given its size, nature and role in the university. Such mistaken perceptions confirm the need for detailed analysis of the particular institution in question before prescribing a code of procedure. The failure of the Court to do this raises doubts about the capacity of the courts to perform this role.

Finally, Beetz J. says that, as a lay body with no legal expertise, the Senate would inevitably treat the appeal as a *de novo* hearing and so the student would not be faced with the additional burden of unfavourable decisions. Without noticing the contradiction, Beetz J. in his next paragraph says even if the Senate does not hear the appeal *de novo* instinctively, the Senate would be bound by law to set aside the earlier decisions as vitiated because of the failure to accord natural justice. This predicts a detailed knowledge of the principles of natural justice and the curative effects of appeals — something one would not have expected of the lay tribunal that Beetz J. described in his previous paragraph.

There is much that is unsatisfactory about the judgment in *Re Harelkin*, both from the point of view of legal principle and its knowledge of the practicalities of university decision-making. It is however, difficult to ignore the latent, often blatant, reluctance of the courts to review university affairs. Three British cases refused relief, two of them after finding breaches of natural justice had occurred. Of these only one<sup>72</sup> is defensible as the student had secured a place at another institution and did not wish to be reinstated so relief was redundant. In another the court found a breach of natural justice had occurred, but felt that no remedy should issue as the student was guilty of the offence.<sup>73</sup> This seems an improper confusion of review of the procedures used, which is all a court should do, and consideration of the merits. The third case simply stated that there was no breach and if there had been no remedy would issue.<sup>74</sup>

## IX. Conclusions

As a study on procedural fairness in operation, the case law on judicial review of university affairs is not encouraging. The courts

72. *R. v. Aston University Senate ex p. Roffey*, *supra*, note 17.

73. *Glynn v. Keele University*, *supra*, note 27.

74. *R. v. Oxford University ex p. Bolchover*, *supra*, note 28.

have recognised the basic distinctions between the various categories of decision. They have, for example, distinguished between trivial and serious disciplinary matters and questions of purely subjective academic evaluation and those involving other objectively ascertainable factors. But there is a consistent failure on the part of the courts to carry the analysis beyond drawing these basic distinctions. The courts have not explicitly articulated the other relevant factors or assessed the weight to be given to the various interests. In particular, the courts have not given guidance on the types of procedures that they feel are required in particular circumstances.

The reasons for this reluctance to lay down guidelines for a flexible code of fair procedure for university administration are less readily apparent. It may be that many of the university cases arose before the revival of judicial review or the advent of procedural fairness. It may be that, faced with similar situations now, the courts would deal more adequately with the issues. Unfortunately the recent case law reveals an even greater reluctance to embark on review of university administration. This is reflected by the resurrection in England of the exclusive jurisdiction of the Visitor and in Canada by the development of an exhaustion of remedies rule.<sup>75</sup>

It is not clear whether this reluctance stems from a belief that the courts lacked the necessary knowledge and expertise to engage in the balancing operation required by procedural fairness. This would raise the issue of whether judicially conducted procedural review is suitable in the more complex administrative world generally. Or the courts might genuinely believe that universities are self-regulating communities where courts should not intervene. If this is true it seems unsatisfactory. Apart from the narrow area of academic evaluation where the courts do not have the capability for review, courts should act as a safeguard against potential abuse. Due deference should be paid to the views of university administrators in deciding whether particular procedures are required. But this deference should not prevent the courts from embarking on review and evaluating the university's claims against other competing interests. Thus it seems either courts are not capable of adequately performing the task of procedural review or without apparent justification they are denying protection

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75. For recent statements advocating judicial non-intervention in university-faculty disputes see *Re Paine and University of Toronto* (1981), 12 D.L.R. (3rd) 325 at p. 331 (Ont. C.A.) and *Re Bezeau and Ontario Institute for Studies* (1982) 134 D.L.R. (3rd) 99 at p. 104 (Ont. D.C.).

to one group in society. On either view there seems little evidence of the new approach to procedural fairness reflected in the university-student case law.